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No. 92-386

In The

Supreme Court of the United States

October Term, 1992

STEPHEN FISHER,

Petitioner,

vs.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, TAX APPEALS TRIBUNAL and JAMES WEXLER, COMMISSIONER OF NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE,

Respondents.

Petition For Writ Of Certiorari To The New York State Court Of Appeals

SUPPLEMENTAL BRIEF

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Foreword

Hereinafter, petitioner's Petition For Writ Of Certiorari is referred to as "Petition"; and the New York State Department of Taxation and Finance is referred to as "Tax Department"; and the New York State Department of Taxation and Finance, Tax Appeals Tribunal is referred to as "Tax Tribunal"; and the New York State Tax Law is referred to as "Tax Law"; and the New York State Civil Practice Law and Rules is referred to as "CPLR".

Introduction

In the first paragraph of their September 10, 1992 letter to this Court, the respondents explain that they do not intend to "submit any papers in response to the petitioner's application for a writ of certiorari". Yet, in their second paragraph, the respondents frame a forceful legal argument that essentially claims that "non-finality" bars this Supreme Court's review:

> "We [the respondents] note, however, that petitioner is not seeking appeal from a final judgment as required by 28 USC § 1257. . . . Thus, there is no final judgment in this case for this Court to review."

This petitioner's supplemental brief (submitted pursuant to the Rules of the Supreme Court — Rule 15.7 and Rule 18.9) addresses only the new, intervening "non-finality" argument first raised in the respondents' letter.

When Respondents Effectively Destroy Petitioner's Due Process "Rights" And "Remedies"; Non-Finality Is No Longer An Issue

The Brinkerhoff-Faris v. Hill, 281 U.S. 673 (1929) decision demonstrates that the instant action is not the first time that this Court has been confronted with a U.S. Constitution (Fourteenth Amendment) due process claim involving a State Tax Department whose position was that "non-finality" should be a bar to U.S. Supreme Court consideration. In Brinkerhoff (as in this case), the State's highest court rejected plaintiff's arguments that there existed no remedies to counteract the State Tax Department's arbitrary and illegal actions that deprived petitioner of due process. Thereafter, this Court, ruling in Brinkerhoff, reversed the Missouri State Court's decision in spite of "non-finality".

> ". . . the [State] court transgressed the due process clause of the Fourteenth Amendment.
>
> "We are not concerned with the rights of the plaintiff on the merits, although it may be observed that the **plaintiff's claim is . . . one on which the opinion of the state court is not final** . . . Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." (emphasis added)
>
> Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 672 and 682

In the instant case; after being denied their motion to quash subpoenas by an administrative judge during the course of a tax hearing, the respondents employed a never-before-used procedure when they submitted a request to quash subpoenas to the in-agency Tax Tribunal.[1]

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1. For factual background material relating to this case, please refer to Petition, starting on pg. 4. The Tax Tribunal's ultimate determination quashing subpoenas was a "decision of first impression". (Petition, pg. 8)

Petitioner's right to submit a motion to enforce subpoenas in New York Supreme Court[2] plus his right to defend against a motion to quash subpoenas in New York Supreme Court[3] were essentially eliminated by respondents actions. In essence, respondents argument supports the notion that it is correct and appropriate in the legal process to have identical motions pending at the same time before an

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2. CPLR § 7308 states: ". . . if a person fails to comply with a subpoena which is not returnable in the court, the person or the petitioner shall move in the [New York] Supreme Court." (Petition, pg. 5)

3. CPLR § 2304 states: ". . . if the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the [New York] Supreme Court. (Petition, pg. 6)

administrative agency and before the New York Supreme Court.[4]

As a practical matter, there is not even an illusory chance that the over-burdened New York Supreme Court could

4. Before the petitioner's tax hearing started, one subpoenaed witness submitted his motion to quash subpoenas in New York Supreme Court. (Petition, pg. 7; Hearing Transcript, Petition, App. A, pg. 4a) Immediately after the tax hearing was recessed (December, 1989); the petitioner (following Administrative Judge Mulligan's clear instructions pursuant to CPLR § 7308) submitted a motion to enforce subpoenas in New York Supreme Court. At about the same time, respondents submitted their request to quash subpoenas to the Tax Tribunal. (Petition, pg. 8) When the Tax Tribunal rendered its decision (Petition, App. B, pg. 33a) quashing subpoenas (April, 1990); the New York Supreme Court action (consisting of one motion to quash subpoenas plus petitioner's motion to enforce subpoenas) was still in its preliminary stages. Upon being advised of the Tax Tribunal's decision; the New York Supreme Court judge (claiming the issues moot) dismissed both pending motions. (Petition, pg. 9)

react to a motion to quash subpoenas with the speed of an administrative agency.[5] Thus, it follows that the respondents' position is that the fast-acting Tax Tribunal can rightfully usurp the statutorial authority of the New York Supreme Court when it first rules on a motion to quash subpoenas.

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5. The difficulties that plague almost all State Court systems are especially prevalent in New York where the State's Chief Judge was forced to take the extraordinary action of suing the State governor in order to get funds necessary to cope with the overwhelming case load. Below is an excerpt from a New York Times article highlighting the Chief Judge's legal action that took place in 1991. (This case started in 1989 with the rendering of the Tax Tribunal's decision. Petition, App. B, pg. 33a)

> Judge Wachtler and Matthew T. Crosson, the chief administrator of the state courts, filed suit against the Governor and the Legislature in State Supreme Court in Albany on Sept. 26, contending that this year's state budget cuts placed an unconstitutional burden on the state's court system. The judiciary's budget request of $966 million was cut by $77 million, forcing the closing of dozens of courtrooms and a severe backlog of civil trials.
>
> *THE NEW YORK TIMES*
> *SEPTEMBER 26, 1991*

If the respondents actions go unchecked and become the "law of the case", defenseless petitioners who follow will be relegated to helplessly grasping for bogus remedies while complying with laws that only pretend that there exists a New York Supreme Court "remedy" for enforcing and quashing non-judicial subpoenas.

"Non-finality" should not bar this Court's review because respondents actions have destroyed the meaning-and-purpose of the statutorial remedies that were enacted to assure petitioner's procedural due process rights.

The Principle Of A "Collateral Order" Applied To This Case Removes Non-Finality As A Consideration

The administrative judge prior to recessing the 1989 tax hearing, rendered a ruling denying respondents' motion to quash subpoenas. (Petition, pg. 5) Upon future resump-

tion of the tax hearing, only tax issues identified by the 1989 hearing petition will be determined at the tax hearing. This tax petition (included as page 84 in the Record on Review submitted to the Appellate Division) deals exclusively with tax issues and makes no mention of subpoenas or witnesses.

Thus, the "constitutional question" (i.e., petitioner being deprived of procedural due process) that is the gravamen of this case is anterior and separable from the merits of the tax hearing and is no way emeshed in tax related issues.

These facts bring this action into the purview of this Court's case law that defines "collateral orders". The key characteristic of a "collateral order" is that it is a "non-final" ruling that is nevertheless the "final disposition" of a claimed right which is not an

ingredient of the cause of action and does not require consideration during the course of the case. Cohen v. Industrial Loan Corp., 337 U.S. 542 (1949). That is, the Tax Tribunal decision (Petition, App. B, pg. 33a) followed by the Supreme Court (Appellate Division) and New York Court of Appeals rulings (Petition, App. C/D/E, pgs. 61a thru 66a) fully disposed of the question of whether witnesses will testify. In no respect did the lower courts determinations leave the subpoena issues open, unfinished or inconclusive. Also, the lower courts' rulings were not concerned with the merits of the tax case. In the final analysis, quashing subpoenas determined a matter completely collateral to the tax issues that will be the only focal points of the hearing.

Further explanation of "collateral orders" came in Coopers & Lybrand v.

Livsay, 437 U.S. 463, 468 (1978).

> "To come within the 'small class' of decisions excepted from the final -judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from the final judgment."

In this case, it is now "written in stone" that the hearing will resume without testimony of the subpoenaed witnesses — there are simply no futher steps that can be taken by petitioner to achieve his Fourteenth Amendment procedural due process rights. "Hence, Cohen's threshold requirement of a fully consumated decision is fully satisfied." Abney v. United States, 431 U.S. 651, 656 (1976)

Petitioner's Claims Fall Into A Category That Defines Situations Where Non-Finality In State Court Is Not A Bar To Review By The U.S. Supreme Court

Cox Broadcasting v. Cohn, 420 U.S. 469 (1975) explained that there should be a "pragmatic approach to determining finality" (Id. at 483) which would remove finality obstacles for this Court when taking jurisdiction in four categories of cases. This Cox standard (and the instant action) covers:

> ". . . situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower court to come." 420 U.S. 469, 477

While solid arguments could be made that the instant action fits into several of the four exceptions to finality explained in Cox, there can be no doubt that the fourth exception cleanly falls on-point with this case.

This fourth category identified by Cox is aimed at guarding against any possibility that an unconstitutional process will become, by default, the "law of the case" when petitioner succeeds at the state level on unrelated state grounds.[6] Put another way, the purpose of the fourth Cox category is to avoid a situation where the petitioner prevails on tax related non-federal grounds in the state tax hearing, thus making the

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6. Of course, regardless of the strength of one's legal position, there always exists the possibility of failure in any court/hearing controversy. After many years of frustration -and- after the expenditure of many thousands of dollars .... whether he is successful or unsuccessful with his ultimate tax claims; there is slim (if any) chance that the exhausted petitioner would continue his arduous struggle through added appeals. That is, if petitioner wins-or-loses at the tax hearing, the respondents could realistically succeed in rewriting the statutes so that the tax agency becomes the sole "power source" to authoritatively quash (or enforce) non-judicial subpoenas. Surely this was not the intention of the legislature when framing CPLR § 2304 and CPLR § 7308.

federal issues moot. Id. at 480

Considering the "precedent setting", "first impression" nature of this case; all New York citizens' rights to deal with non-judicial subpoenas in New York Supreme Court will be "lost probably irreparably if review has to await final judgment". Abney v U.S. 651, 656

For The Purpose Of Reviewing The Isolated Action Quashing Subpoenas; The Tax Tribunal Decision Is "Final"

At the beginning of Tax Law § 2016, the New York State Legislature defined "finality" as it relates to Tax Tribunal rulings.

> "A decision of the tax appeals tribunal, which is not subject to any further administrative review, shall finally and irrevocably decide all the issues which were raised in proceedings before the division of tax appeals upon which such decision is based . . ."

Tax Law § 2016 is annexed hereto in its entirety as Supplemental Brief, Appendix A, pg. 1a

In approaching the Tax Tribunal after the administrative judge denied their motion to quash subpeonas; respondents only request was that the subpeonas be quashed. In the context of Tax Law § 2016, the Tax Tribunal's ultimate decision quashing subpoenas must be "final" because the administrative judge and Tax Tribunal have already rendered determinations — in all Tax statutes (and within the Tax Deapartment structure), there are no further laws and no further legal mechanisms that could possibly sanction more (or different) administrative reviews. Furthermore, there is no authoritative person (or entity) in the Tax Department who could conceivably have power to rule on motions to quash subpoenas after the administrative judge and Tax Tribunal have rendered determinations.

Thus, with no possible further review of the Tax Tribunal decision within the administrative agency; the unconditional decision that quashed subpoenas is ultimately "final" pursuant to the controlling Tax Law § 2016.

Conclusions

For the reasons stated above, the Petition for Certiorari should be granted.

If this Court should request that respondents submit further papers — because respondents have already expressed their non-finality argument; it is respectfully suggested that any such respondents' "papers" be limited to dealing with the central issue of a government agency (acting beyond delegated powers) depriving petitioner of procedural due process rights.

Dated: October 15, 1992

Respectfully,

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§ 2016. Judicial review

A decision of the tax appeals tribunal, which is not subject to any further administrative review, shall finally and irrevocably decide all the issues which were raised in proceedings before the division of tax appeals upon which such decision is served by the tax appeals tribunal upon every party to the proceeding before such tribunal by certified mail or personal service, the petitioner who commenced the proceeding petitions for judicial review in the manner provided by article seventy-eight of the civil practice law and rules, except as otherwise provided in this section. Such service by certified mail shall be complete upon deposit of such notice, enclosed in a post-paid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States postal service. The petitioner shall designate the tax appeals tribunal and the commissioner of taxation and finance as respondents in the proceeding for judicial review. The tax appeals tribunal shall not participate in proceedings for judicial review of its decisions and such proceedings for judicial review shall be

commenced in the appellate division of the supreme court, third department. In all other respects the provisions and standards of article seventy-eight of the civil practice law and rules shall apply. The record to be reviewed in such proceedings for judicial review shall include the determination of the administrative law judge, the decision of the tax appeals tribunal, the stenographic transcript of the hearing before the administrative law judge, the transcript of any oral proceedings before the tax appeals tribunal and any exhibit or document submitted into evidence at any proceeding in the division of tax appeals upon which such decision is based.